No. 93-203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

****

TOMMY BLAKE McCARY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ronald H. Mook, OBA #06322
616 West 13th Street
Tulsa, OK 74127
918/583-7094

Attorney of record for Petitioner

Jack Marwood Short, OBA #8208
1709 Utica Square, Suite 230
Tulsa, OK 74114-1420
918/744-8000

Counsel for Petitioner

July 1993

29 pp

QUESTION PRESENTED

Did the failure of the Rule 11 Fed. R.Cr.P. proceeding to inform Tommy McCary on his plea of guilty of the penalty he realistically faced under the sentencing guidelines violate his right to due process of law under the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

Question Presented.....i

Table Of Contents And Of Authorities..ii

Opinion Below.....1

Jurisdiction.....2

Constitutional Provison, Fifth Amendment, Due Process.....2

Statutory Provisions, Rule 11(c) and (d) Fed. R. Cr. P.....2

Statement Of The Case.....3

Reasons For Granting Writ.....8

Argument.....10

THE REQUIRED RULE 11 COLLOQUY FAILS TO INCLUDE A SUFFICIENT EXPLANATION OF THE IMPACT OF THE SENTENCING GUIDELINES DEPRIVING TOMMY McCARY OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW

Conclusion.....18

Certificate Of Service.....19

Appendix A, Fifth Circuit Opinion, Case No. 92-1804.....1a

TABLE OF AUTHORITIES

Fifth Amendment, Due Process Clause....2

Rule 11(c) and (d), Fed. R. Cr. P.....2

United States v. Horne, 987 F.2d 833 (D.C. Cir. 1993).....14

United States v. Watley, 987 F.2d 841 (D.C. Cir. 1993).....17

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

****

TOMMY BLAKE McCARY, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TOMMY BLAKE McCARY, Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 13, 1993.

OPINION BELOW

The opinion by the Court of Appeals,

Case No. 92-1804, is not published; so, a copy is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals in accordance with its opinion was entered May 13, 1993. This petition is being filed within ninety (90) days of the date of the judgment. This Court's jurisdiction is invoked pursuant to the provisions 28 U.S.C. § 1244(1).

CONSTITUTIONAL PROVISION

Fifth Amendment in pertinent part: . . . nor [shall any person] be deprived of life, liberty or property, without due process of law; . . . ."

STATUTORY PROVISIONS

Federal Rules of Criminal Procedure Rule 11, in pertinent part:

11(c) Advice to Defendant. Before accepting accepting a plea of guilty . . . , the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) the nature of the charge to which the plea is offered, the the mandatory minimum penalty pro-provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances; . . . .
>
> * * *
>
> (d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary . . . . The court shall also inquire as to whether the defendant's willingness to plead guilty . . . results from prior discussions between the attorney for the government and the defendant or the attorney for the defendant.

STATEMENT OF THE CASE

The United States District Court for

the Northern District of Texas, court of first instance, was vested with jurisdiction of this criminal case by 18 U.S. C. § 3231.

On October 8, 1991, around 1:42 a.m., near Commerce, Texas, Commerce Police Officers stopped a 1983 pickup for traffic violations. During their investigation, the officers searched the occupants, James Howard Haney, the driver, and passengers Kim Dolan Davis and Tommy Blake McCary, and seized methamphetamine in the quantities and with the characteristics from each, to-wit:

HANEY--449.47 g. at 36% purity= 161.809 g. brownish, rock like substance in a large plastic bag.

DAVIS--439.52 g. at 40% purity= 175.788 g. brownish, rock like substance in a large plastic bag.

McCARY--25.17 g. at 17% purity=4.28 g. white, powdery substance in a smaller plastic bag.

[4.28 g. white powder by McCary; 337.616 g. brownish rock like by the other two defendants, total=341.89]

On October 22, 1991, they were indicted in the United States District Court for the Northern District of Texas, Dallas Division, on a One Count Indictment:

> On or about October 8, 1991, in the Dallas Division of the Northern District of Texas, JAMES HOWARD HANEY, KIM DALON DAVIS and TOMMY BLAKE McCARY, defendants, knowingly and intentionally possessed, with intention to distribute, a controlled substance, namely methamphetamine, a Schedule II controlled substance.
>
> In violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(viii).

On January 31, 1992, McCary, his lawyer and the Assistant United States Attorney executed a Factual Resume of the offense as basis for McCary's plea of guilty.

On January 31, 1992, McCary pled guilty to the Indictment and was released on bond; then failed to appear for

sentencing until arrested July 11, 1992. In the meantime, the Probation Office circulated its Presentence Report on McCary dated April 10, 1992, which attributed the entire quantity of the methamphetamine seized from all three defendants to McCary and established a total offense level of 36 and criminal history category of I with a guideline range of 188 to 235 months. McCary was a first offender.

On April 15, 1992, McCary filed objections to the PSR contending he possessed only 4.28 g. of pure methamphetamine; so, only that amount should be attributed to him for a 20 base offense level plus two points for impeding prosecution for a total offense level of 22, and a guideline range of 41 to 51 months.

On September 3, 1992, McCary filed a Motion to withdraw his plea of guilty

pursuant to Rule 32(d) Fed.R.Cr.P., stating:

1. Defendant asserts his innocence of the offense of possession of methamphetamine with intent to distribute;

2. Defendant also desires to urge his motion to suppress evidence filed herein which motion was rendered moot by the entry of his plea of guilty;

3. Defendant further asserts that, at the time of entry of plea, his attorney had not correctly advised him of the statutory punishment provided for the offense alleged in the indictment and that he entered his plea of guilty under a misapprehension as to such punishment; and he asserts his plea was not knowingly and voluntary.

On September 9, 1992, the court denied said motion to withdraw. At the sentencing hearing on September 11, 1992, the district court adopted the factual findings and guideline application in the PSR and sentenced McCary to 211 months (17.58 years) in prison plus a 5 year supervised release and a $50 special assessment.

The Court of Appeals for the Fifth Circuit affirmed the district court's denial of McCary's motion to withdraw his plea of guilty and the judgment and sentence; hence, this Petition For A Writ Of Certiorari.

REASONS FOR GRANTING THE WRIT

The question of whether his Rule 11 plea of guilty proceeding violated Mr. McCary's right to due process of law by not informing him of the penalty he faced under the sentencing guidelines was not raised in the lower courts. It now seems from the law and the facts in this case that such a violation did occur. Also, it appears from some recent federal circuit court decisions that this is a problem common to many criminal cases because Rule 11 does not require a defendant to be informed of

the penalties imposed by the sentencing guidelines before a plea of guilty or as in this case the quantity of illegal drugs involved which determines the sentence to a large extent.

This case offers the Court an opportunity to explore and resolve the problem a defendant has in ascertaining the penalty he faces on a plea of guilty since the sentencing guidelines have virtually replaced statutory penalties for sentencing purposes.

While the Advisory Committee on Criminal Rules, the Sentencing Commission and this Court by approving rule changes, may, in due time, cure that flaw in the law, only this Court at this time can, by granting this Petition, cure it now.

This Court can also establish a rule requiring the probation office to pre-

sent its calculation of the guidelines applicable to a defendant's offense at the plea hearing so defendants will have a greater understanding of the penalty consequences on a plea of guilty.

ARGUMENT

The Required Rule 11 Colloquy Fails To Include A Sufficient Explanation Of The Impact Of The Sentencing Guidelines Depriving Tommy McCary Of His Liberty Without Due Process Of law

The record herein establishes there was no mention whatsoever of the quantity of methamphetamine attributable to Tommy McCary until the presentence report was issued in April, 1992.

The indictment does not express a quantity on its face. It charges the three defendants with possessing methamphetamine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b) (1)(A)(viii). It's

true that subsection(viii) establishes a penalty of ten years to life for 100 grams or more of methamphetamine. And, it's true that the total amount of the pure methamphetamine seized from all three defendants was 341.89 grams with McCary being in personal possession of only 4.28 grams of white powder with the rest being brownish and rock like possessed about equally by the other two defendants.

Because the indictment charges neither conspiracy nor aiding and abetting, it is logical to assume each defendant would be accountable only for the amount he personally possessed.

The Factual Resume dated and signed by the parties on January 31, 1992, (same day McCary pled guilty) is silent as to the quantity of methamphetamine.

At the plea hearing on January 31,

1992, the district court was almost letter perfect in its obviously conscientious efforts to fulfill its responsibilities under Rule 11---except for the glaring omission of any mention of any quantity of methamphetamine involved and the consequences that quantity could or would have on McCary's sentence.

It wasn't until McCary's counsel received McCary's presentence report from the probation office in April, 1992, 1992, that McCary and his counsel realized the entire quantity seized from all three defendants would be attributed to McCary under relevant conduct for a prison range of 188 to 235 months, 15.67 to 22.08 years.

McCary promptly filed objections to the PSR contending only 4.28 grams of pure methamphetamine should be attributed to him for a prison range of 41 to

51 months.

McCary was on bond and admits he failed to appear for sentencing until he was arrested July 11, 1992.

On September 3, 1992, McCary filed a motion to withdraw his plea of guilty, asserting his innocence as charged and that his attorney had not correctly advised him of the statutory penalty causing him to plead guilty under a misapprehension as to the penalty so that his plea of guilty was not knowingly and voluntary. The district court denied that motion on September 9, 1992.

At his sentencing on September 11, 1992, McCary testified he understood he pled guilty only to the amount of methamphetamine he personally possessed. The district court was not persuaded and adopted the PSR, then imposed sentence accordingly.

Obviously, McCary and his counsel were thinking McCary's plea was to his small quantity while the government including the probation office was thinking of the entire amount seized. The district court stated the statutory minimum and maximum penalty but made no inquiry as to the amount attributable to McCary. Neither did the Assistant United States Attorney.

Granted, McCary damaged his position by his absence for several months. But that shouldn't detract from the fact the failure of the Rule 11 proceeding to inform him realistically of the penalty he faced violated his right to due process of law.

A recent opinion by the District of Columbia Circuit recognizes and recommends a solution to the problem. United States v. Horne, 987 F.2d 833, 838 (D.C.

Cir. March 19, 1993), wherein Judge Buckley writes separately for the court at 838:

> With the advent of the Guidelines promulgated by the United States Sentencing Commission, certain goals of the Rule 11 plea-taking procedure have become more difficult to achieve. That rule was designed to make sure that a guilty plea is both voluntary and informed. Yet while Rule 11 requires a court to advise the defendant of the "maximum possible penalty provided by law" for the offense or offenses of which he is charged, in many federal criminal cases today, this statutory maximum is irrelevant. The reality is the sentencing court is confined to the range of penalties prescribed by the Guidelines except in rare instances in which an upward departure is permitted. [citation omitted.]

then at 841:

> . . . Yet if, after his plea is accepted as an alternative to going to trial, he may well be trapped by the formal implications of a guilty plea and the failure of the Rule 11 proceeding to provide him with a reliable understanding of the consequences. Rule 11, then, can contribute to the problems posed by sentencing surprises in two ways: by failing to inform defendants before they plead as to the penalties they realistically face; and

by making it more difficult to withdraw a plea once it has been accepted.

then back to 839:

> Because the Guidelines have largely replaced the statutes as the determinants of the maximum penalty facing criminal defendants, we recommend that, wherever feasible the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and informed.

Here, Tommy McCary was trapped by the formal implications of his guilty plea and the failure of the Rule 11 proceeding to provide him with a reliable understanding of its sentencing consequences. McCary admits he and his attorney tripped over the fact 21 U.S.C. §841(b)(1)(A)(viii) alleged in the indictment does fix the penalty for a 100 grams or more of methamphetamine at 10 years to life; but, they were thinking only of the 4.28 grams possessed per-

sonally by McCary and the guideline range for that quantity---not the 341.89 grams possessed by all three defendants. [4.28 by McCary; 337.616 by the other two defendants who possessed over a 100 grams each.]

See also United States v. Watley, 987 F.2d 841 (D.C. Cir. March 19, 1993) decided the same day as Horne, supra, for a detailed plea colloquy which still resulted in confusion as to the defendant's sentence causing the circuit court to reverse the district court's denial of defendant's motion to withdraw his plea of guilty.

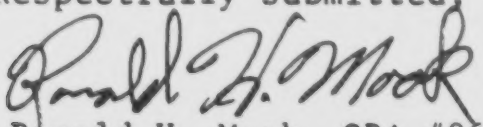
McCary asserts it is fundamental that failure of the Rule 11 proceeding to inform him of the quantity of methamphetamine attributable to him for his base offense level under the Guidelines before he pled guilty violated his right

to due process of law under the Fifth Amendment to the United States Constition.

CONCLUSION

The interest of justice nationwide would be well served by this Court granting a Writ Of Certiorari and addressing this important issue of federal law.

Respectfully submitted,



Ronald H. Mook, OBA #06322
616 West 13th Street
Tulsa, OK 74127
918/583-7094

Attorney of record for Petitioner

Jack Marwood Short, OBA #8208
1709 Utica Square, Suite 230
Tulsa, OK 74114-1420
918/744-8000

Counsel for Petitioner

July 1993

CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of this Petition For A Writ Of Certiorari to each of the following:

Drew S. Days, III, Esq.
Solicitor General
U. S. Department of Justice
Washington, D.C. 20530

Michael J. Uhl, Esq.
Assistant United States Attorney
United States Courthouse
1100 Commerce Street, Room 16G28
Dallas, TX 75242

on the 7th day of August, 1993, with postage thereon prepaid.

Ronald H. Mook

Ronald H. Mook

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1804
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TOMMY B. McCARY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas
(3:91 CR 329 D)

Before JOLLY, DUHE, and BARKSDALE, Circuit Judges. PER CURIAM:[1]

Appellant was convicted and sentenced on his guilty plea to possession of illegal drugs with intent to distribute and he now appeals. We affirm.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX A

Appellant first contends that the district court violated Rule 11(c)(1) when it attributed to Appellant the drugs found on the persons who occupied the pickup truck with him, and the drugs found on the seat of the truck, without having first advised him that it would do so. Rule 11 requires only that the district court determine whether the guilty plea was coerced and whether the defendant understands the nature of the charge and the consequences of his plea. Fed. R. Crim. P. 11. The court read the charge to the Appellant and explained what the Government had to prove in order to obtain a conviction. It then informed him that by pleading guilty he subjected himself to a minimum sentence of not less than ten years and a maximum sentence of life. The district

court was not required to "calculate and explain" Appellant's sentence under the Guidelines before accepting his plea. United States v. White, 912 F.2d 754, 756 (5th Cir.), cert denied, 498 U.S. 989 (1990). Nor was the court required to inform Appellant of the quantity of drugs involved or the consequences that this quantity of drugs could have on his sentence. See, United States v. Shacklett, 921 F.2d 580, 583 n. 3 (5th Cir.) (failure to inform defendant that he could be sentenced based on a quantity of drugs greater than that mentioned in the plea agreement did not not violate Rule 11).

Next, Appellant claims that the district court erred by denying his motion to withdraw his guilty plea. He contends that counsel misinformed him about the possible punishment, and

suggests that his plea was not knowing and voluntary because he was under the misapprehension that only the quantity of drugs found on his person could be used in sentencing him. We review for abuse of discretion. In United States v. Carr, 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1985) we enumerated seven factors courts should consider when ruling on a Rule 32(d) motion. Applying those factors makes clear that Appellant's argument is meritless. The district court explicitly advised him of the maximum and minimum statutory punishment that he faced. That is all that is required.

Finally, Appellant argues that the district court misapplied the Guidelines by not basing his sentence only on the the amount of drugs on Appellant's

person. The record makes clear that the district court did not credit Appellant's testimony that he was unaware of the drugs hidden on his companions and in the truck. The court specifically found that each of the three defendants was aware that the others had drugs, that they knew what they were doing and that they were possessing the drugs with intent to distribute. This finding is not clearly erroneous. United States v. Manthei, 913 F.2d 1130, 1133 (5th Cir. 1990). The Guidelines require that the court determine a defendant's offense leval based on the relevant conduct which includes "all foreseeable acts and ommissions of others" in furtherance of jointly undertaken criminal activity. U.S. S.G. 1B1.3(a)(1)(B). It is not necessary that the acts be charged as a

conspiracy. Id. This is precisely what the district court did.

AFFIRMED.